Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PATRICIA JOHNSON, JAIME GOROSTIETA
and ESTEBAN EPIFANIO RIVERA,

Petitioners,

v.

E.A. MILLER, INC., RICK BLACK
and TED MILLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. If a female employee can show that her work environment is pervasively infused with sexually discriminating policies and behavior, must she wait until she is fired or raped before she has a Title VII discrimination claim?

II. Does a racially segregated work environment contravene the Civil Rights Act of 1964, and does a person forced to work in such an environment have a remedy when he/she cannot prove direct individual discrimination?

III. Must a disabled employee who, because of work-related injuries, requires reasonable accommodations under the Americans With Disabilities Act affirmatively inform his/her employer of the expected duration of the impairment to avoid termination?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Antionio Rueda, Lolohea Topou, Taufa Tupou, Ofa Fiefia, Moses Fiefa, Lorenzo Rodriguez, and Victor James Shepard, as the heir and personal representative of Ruby Shepard, were parties before the court of appeals and are represented by counsel for Petitioners.

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Petitioners, Patricia Johnson, Jaime Gorostieta and Esteban Epifanio Rivera, respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, in *Johnson v. E.A. Miller*, (10th Cir. 1999) (App. A),[1] is unreported but can be found at Appendix A. The opinion and order of the District Court in *Johnson, et al. v. E.A. Miller, et. al.*, Civ. No. 94-NC-148B (D. Utah 1994) is not published, but can be found at Appendix B & C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on February 25, 1999. The Court of Appeals denied a timely Petition for Rehearing *En Banc* on April 19, 1999. (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 660(c)

> (c) Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

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1. Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

42 U.S.C. § 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

42 U.S.C. § 2000e-3

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an

> investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 12112(a)

> (a) General rule
>
> > No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

The Petitioners in this case are former employees of E.A. Miller, Inc. ("E.A. Miller"), who were terminated based on racial, sex and disability discrimination. The Respondents are E.A. Miller, Ted Miller, and Rick Black, an E.A. Miller supervisor. Under 42 U.S.C. § 2000e-2, it is unlawful for an employer to discharge or to discriminate against an employee "with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." Under 42 U.S.C. § 12112(a), an employer shall not "discriminate against a qualified individual with a disability because of the disability of such individual" in regard to employment. This case arises out of E.A. Miller's racial, sex and disability discrimination of the Petitioners.

The facts are undisputed that E.A. Miller, Inc. engaged in the following discriminatory and harassing employment practices:

- Minority employees were segregated from Caucasian, American-born males employees. Minority employees were assigned dangerous, unpleasant and more physically demanding jobs in areas, such as the Kill Floor of the slaughterhouse, with high injury and accident rates. In contrast, Caucasians worked in safer areas, like the Trucking Department, Maintenance, the Administrative Offices, the Warehouse, and the Loading Dock. E.A. Miller's management personnel are Caucasian, American born and male.

- Many qualified minority and females employees have been denied admittance and advancement into management and the Caucasian work areas.

- E.A. Miller's discriminatory practices permeate its business. Management employees have repeatedly stated that minority employees are lazy and unproductive. On numerous occasions, E.A. Miller management personnel have derogatorily referred to African-American employees as "Buckwheat, " to Native Americans as "Chief," and to Hispanics as, "dirty Mexicans," "Sons-of-a-Bitches," "F--kers," "Bastards," and "Wetbacks" who would get themselves killed. E.A. Miller's personnel director took adverse action against Polynesians because of their allegedly high birth rate.

- E.A. Miller's supervisors purposely failed to train minority, female and disabled employees for jobs in areas or positions where they were not welcome.

- E.A. Miller has a history of denying medical care to minority employees or harshly criticizes those who do receive medical care. E.A. Miller has repeatedly eliminated injured or ill employees by forcing them to work beyond their capabilities, even after being injured.

The first question in this case is whether a female employee must wait until she is fired or raped before she has a Title VII discrimination claim where she can show that her work environment is pervasively infused with sexually discriminating policies and behavior. This issue arises in the context of Petitioner Patricia Johnson's ("Johnson") complaint in District Court against the Respondents for sexual harassment and discrimination caused by E.A. Miller management's pattern of sexual advances and threats towards Johnson.

In support of her claim, Johnson adduced evidence that when she started her employment with E.A. Miller, Respondent Rick Black ("Black") asked her to engage in sex with him and subjected her to other sexually hostile behavior. In May, 1992, Johnson complained several times to several management employees about Black's behavior. After Johnson complained, Black warned her to watch her "ass" and not cross him again. In July, 1992, Black threatened to "**f--k**" Johnson and to "**kick her ass**," and became openly hostile towards her. When Johnson refused Black's vulgar advances, Johnson was interrogated for four

hours, was brought up on numerous false work deficiencies, was suspended without pay, and was denied the right to be considered for a promotion. During several meetings, Black, in a rage, tried to force her to sign an agreement acknowledging the veracity of these false and baseless deficiencies — Johnson refused. In addition, Black told Johnson that she was to "go through him" before speaking to any of E.A. Miller's supervisors, who were all male, because "women have no credibility in this industry." Despite this adverse and hostile environment, the District Court granted summary judgment against Johnson, which the Court of Appeals upheld.

In affirming the District Court's summary judgment against Johnson, the Court of Appeals stated that her "claim fails because she has not made a sufficient showing that the treatment she received by the defendants was *because* of her sex," and stated that Johnson had no claim unless she could "allege at least one instance of such harassment on or after July 21, 1992." App. A at 3a. By doing so, the Court of Appeals refused to consider Black's pattern of vulgar and hostile threats towards Johnson and E.A. Miller's retaliation against her for reporting Black, and summarily dismissed a case of blatant and open discrimination, which would not have occurred if Johnson were a Caucasian man.

The second question in this case is whether a racially segregated work environment violates the Civil Rights Act of 1964, and, if so, whether an employee forced to work in such a segregated environment has a remedy under the Act when he/she cannot prove direct individual discrimination. This issue arises in the context of the complaint of Petitioners Jaime Gorostieta ("Gorostieta") and Esteban Rivera ("Rivera") for E.A. Miller's discriminatory practices

of segregating minority employees from Caucasian, American-born male employees. Minority employees were assigned dangerous, unpleasant and more physically demanding jobs in areas, such as the Kill Floor of the slaughterhouse, with high injury and accident rates. In contrast, Caucasians worked in safer areas, like the Trucking Department, Maintenance, the Administrative Offices, the Warehouse, and the Loading Dock. E.A. Miller's management personnel are Caucasian, American born and male.

In addition, E.A. Miller's management employees stated that its minority employees, including Mexicans Native Americans, are lazy and unproductive. Further, E.A. Miller management derogatorily referred to African-American employees as "Buckwheat," to Native Americans as "Chief," and to Hispanics as, "dirty Mexicans," "Sons-of-a-Bitches," "F--kers," "Bastards," and "Wetbacks" who would get themselves killed. E.A. Miller's personnel director, took adverse action against Polynesians because of their allegedly high birth rate. Because of the segregated and racially hostile environment, combined with E.A. Miller's refusal to provide accommodations to injured employees under the ADA ("ADA"), Gorostieta and Rivera filed suit in District Court under the Civil Rights Act of 1964 and the ADA.

The third question in this case is whether an employee who requires reasonable accommodation for work-related injuries under the ADA must inform his/her employer of the expected duration of the impairment to avoid termination. In the District Court and before the Court of Appeals, Gorostieta and Rivera submitted evidence that the work environment at E.A. Miller was permeated with racial

and disability discrimination, including an express written policy of eliminating employees regarded as disabled.

The Court of Appeals concluded that Gorostieta failed to show that he is qualified under the ADA because "[h]e was initially terminated for poor performance, after receiving numerous warnings both before and after the onset of pain in his hands over a two-and-one-half year period." App. A at 6a. Over eight years of employment he was given eight conduct improvement reports, five of them were for insignificant problems that were resolved and never repeated and only three were given for alleged poor work performance. If these warnings had been viewed in light of E.A. Miller's disability policies, the conclusion would have been that they were a guise through which E.A. Miller justified terminating disabled employees. A jury should have been allowed to weigh the evidence on this issue.

E.A. Miller had a policy of terminating any employee who needed any accommodation for a work place injury and such employees were regarded as disabled. This policy caused a hostile work environment in which Hispanics, who worked the most dangerous jobs, were driven like animals and fired if they asked for even the slightest accommodation for an injury or an illness. When it was known that an employee was experiencing problems, instead of accommodating him/her, E.A. Miller purposefully increased the workload. Gorostieta presented additional evidence that E.A. Miller purposely failed to train him.

The Court of Appeals, however, held that E.A. Miller's did not discriminate against Gorostieta for being disabled when they rehired him and then learned that he needed surgery as a result of a work-related injury. In reaching that

conclusion, the Court of Appeals stated that Gorostieta had, "failed to present any evidence of the expected duration of her impairment as of the date of [his] termination." App. A at 6a (citing *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996). In so ruling, the Court of Appeals established a standard which places the burden of providing reasonable accommodations on the employee, instead of on the employer as intended by the ADA.

In response to their termination from E.A. Miller, Petitioners filed a complaint on November 23, 1994, seeking redress for their injuries. The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §§ 1331 and 1337 because the case presented a federal question arising under the Civil Rights Act of 1964.

Petitioners filed a timely appeal with the Court of Appeals for the Tenth Circuit. On February 25, 1999, the Court of Appeals affirmed the District Court's judgment. Ignoring the plaintiffs' claims of a racial, sexual and disability hostile work place and the Court of Appeals refused or failed to rule on these claims and its opinion is silent thereon and provides no explanation for its refusal to address these claims. Moreover, its decision as to Ms. Johnson's claims makes a factual determination that should be left to the jury. App. A at 2a, 3a, 4a, 5a, 6a, 7a, 11a. Petitioner's request for *en banc* review was denied April 19, 1999.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON SEXUAL HARASSMENT AND DISCRIMINATION.

The Petition should be granted because the Court of Appeals decision directly conflicts with this Court's prior rulings on sexual harassment and discrimination. In *Harris v. Forklift Systems, Inc.*, this Court stated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated."[2] Nevertheless, the Court of Appeals failed to consider the pervasively intimidating working conditions at E.A. Miller.

The Court of Appeals in this case has substituted a "single instance of discrimination" standard in sexual harassment and discrimination cases, instead of this Court's "hostile environment" standard. This Court should grant the Petition in order to clarify and solidify the hostile discriminatory environment standard in sexual harassment and discrimination cases. The decision of the Court of Appeals substituted a new standard, "single instance of discrimination," in this case. In so doing, the Court of Appeals ruled in this case that "unless [Johnson] is able to

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2. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993) (citations and internal quotation marks omitted).

allege at least one instance of such [sexual] harassment on or after July 21, 1992," Johnson would not be allowed to present her case.

This Court has stated that "[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII."[3] In order to succeed in such an action, the plaintiff must prove that the conduct was "severe or pervasive."[4] Despite this Court's clear standard, the Court of Appeals in this case refused to allow the fact-finder to determine whether there was severe or pervasive conduct. Instead, the Court of Appeals determined that the adverse employment action against Johnson "occurred several months after her complaint about the sexual harassment," and was, therefore, an isolated instance of an unwarranted reprimand which does not rise to the level of a cognizable claim. App. A at 4a.

This Court has further stated that unlawful employment practices under Title VII include discrimination of sex that have "the purpose *or* effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Under *Vinson*, it is clear that E.A. Miller could not legally require a female employee to go through a male co-worker before speaking with male supervisors "because

3. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2265, 141 L. Ed. 2d 633 (1998).

4. *Id.*

women have no credibility in [the] industry." Yet the decision of the Court of Appeals subjects Johnson, a female employee forced to endure such conditions, to only two choices: succumb to the male hierarchy at E.A. Miller or be terminated. By circumventing the *Vinson* standard set forth by this Court, the Court of Appeals has opened the door for the denial of other female employees' claims in similar circumstances, in contradiction to this Court's prior rulings.

Under the standards used by the Court of Appeals in this case, most adverse actions taken against an employee in violation of Title VII will be justified by the company either before the adverse action or afterwards by creating the circumstances that allow the defendants to assert poor work performance, or some other deficiency, as a justification for their behavior. Moreover, the decision of the Court of Appeals indicates that so long as a company waits several months after an employee engages in a protected activity, it can then commence the groundwork (such as bringing false and numerous accusations of work deficiencies) necessary to justify terminating the employee. As a result, if an employee is unwise and says, "enough is enough" and abandons ship, the last discriminatory act, without an airing of the facts before a jury, will be deemed per se by the Court of Appeals to be "isolated."

The decision of the Court of Appeals further seems to indicate that circumstantial evidence is insufficient to prove retaliation. It is apparent that unless the discrimination occurs daily and one has a video tape of the activity or a management employee admits to the allegations of discrimination, the facts supporting the claim will be chopped up and deemed as isolated and disregarded by the

Court of Appeals as "not a tangible employment action." This Petition should therefore be granted because the Court of Appeals has developed a standard for sexual harassment and discrimination claims which contradicts this Court's precedent.

II.

THE PETITION SHOULD BE GRANTED TO RESOLVE WHETHER A RACIALLY SEGREGATED EMPLOYMENT ENVIRONMENT CONTRAVENES THE CIVIL RIGHTS ACT OF 1964, AND, IF SO, WHETHER A PERSON FORCED TO WORK IN SUCH AN ENVIRONMENT HAS A REMEDY WHEN HE/SHE CANNOT PROVE DIRECT INDIVIDUAL DISCRIMINATION.

This Court should grant the Petition to consider the controversial issue of whether an employer who racially segregates its workforce violates the Civil Rights Act of 1964. Ancillary to that issue is the question of whether an employee forced to work in such an environment has an enforceable remedy, even when he/she cannot prove direct individual discrimination.

As stated above, this Court has a clearly defined standard for sexual harassment and discrimination: "the protection afforded under Title VII has always been expansive, extending not just to economic inequality, but also to " 'working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' and 'demeaning and disconcerting' " conditions of

employment."[5] Nevertheless, this Court has not specifically adopted this standard for racial discrimination.

In its dissent in *Burlington Industries*, this Court stated that after *Rogers v. EEOC*, "a plaintiff claiming employment discrimination based upon race could assert a claim for a racially hostile work environment, in addition to the classic claim of so-called 'disparate treatment.' "[6] This case presents the circumstances under which this Court should clarify the standard for racial discrimination to comply with the decision of the Fifth Circuit Court of Appeals in *Rogers*.

In reviewing the District Court's grant of summary judgment against Gorostieta and Rivera in this case, the Court of Appeals claimed that in their depositions, Gorostieta and Rivera had "disclaimed any adverse employment action as a result of their national origin." App. A at 5a. The Court of Appeals failed to consider, in its de novo review, deposition evidence that there was an environment at E.A. Miller which was hostile towards minorities. For example, in his deposition, Rivera stated:

> Q. While you were at E. A. Miller, did anyone ever use with you any language that you felt was demeaning or unkind or derogatory

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5. *United States v. Burke*, 504 U.S. 229, 112 S. Ct. 1867 (1992) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66, 67, 106 S. Ct. 2399, 2405, 2406, 91 L. Ed. 2d 49 (1986) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (CA5 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972)); *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

6. *Burlington* at 118 S. Ct. 2272 (dissent).

about the Hispanics, Mexicans or anything of that Nature?

A. Yes.

Q. And can you remember if this was — during what period of time when you first worked there, during the middle or towards the end or just all the time?

A. I heard one was Ron Porter in his areas. (Rivera went on to explain, through inarticulate and poor English, that the abusive language was directed to the Hispanics and that he didn't think it was directed to a white person.)

Similarly, Gorostieta stated at his deposition:

Q. Do you believe you were ever discriminated against at E.A. Miller because you're Hispanic?

A. Probably it could be, I guess like that. (He also explained that he was aware that Hispanics were given the most arduous jobs on the kill floor were he worked at E.A. Miller.)

Moreover, there was evidence that E.A. Miller's management employees called its Mexicans and Native American employees lazy and unproductive, and took adverse action against Polynesians because of their allegedly high birth rate. E.A. Miller's management also derogatorily

referred to African-American employees as "Buck wheat," to Native Americans as "Chief," and to Hispanics as, "dirty Mexicans," "Sons-of-a-Bitches," "F--kers," "Bastards," and "Wetbacks" who would get themselves killed.

By failing to consider such evidence of the racially hostile environment at E.A. Miller the District Court and the Court of Appeals have limited the Civil Rights Act of 1964 as a remedy to only those cases where an individual plaintiff can prove specific discriminatory acts against him/her, resulting in adverse employment action. Although it is true that the adverse employment action actually suffered by Gorostieta and Rivera came as a combined result of racial and disability discrimination, the racially hostile environment at E.A. Miller should have been sufficient to proceed under the Civil Rights Act. It defies logic that a female employee with a sexual discrimination claim under the Civil Rights Act for employment in a pervasively hostile and discriminatory environment is allowed to proceed, while an employee from a racial minority in a similarly hostile and discriminatory environment is not allowed to proceed. Accordingly, this Court should grant the Petition to establish uniform standards regarding what constitutes a racial discrimination claim under the Civil Rights Act.

III.

THE PETITION SHOULD BE GRANTED TO DETERMINE WHETHER A DISABLED EMPLOYEE WHO REQUIRES REASONABLE ACCOMMODATIONS UNDER THE ADA MUST AFFIRMATIVELY INFORM HIS/HER EMPLOYER OF THE EXPECTED DURATION OF THE IMPAIRMENT TO AVOID TERMINATION.

This Court should grant the Petition to consider whether an employee who requires reasonable accommodation for work-related injuries under the ADA must inform his/her employer of the expected duration of the impairment to avoid termination. In the District Court and before the Court of Appeals, Gorostieta and Rivera submitted evidence that the work environment at E.A. Miller was permeated with racial and disability discrimination, including an express written policy of eliminating employees regarded as disabled.

The Court of Appeals concluded that Gorostieta failed to show that he is qualified under the ADA because "[h]e was initially terminated for poor performance, after receiving numerous warnings both before and after the onset of pain in his hands over a two-and-one-half year period." App. A at 6a. Over eight years of employment he was given eight conduct improvement reports, five of them were for insignificant problems that were resolved and never repeated and only three were given for alleged poor work performance. If these warnings had been viewed in light of E.A. Miller's disability policies, the conclusion would have been that they were a guise through which E.A. Miller justified terminating disabled employees. A jury should have been allowed to weigh the evidence on this issue.

E.A. Miller had a policy of terminating any employee who needed any accommodation for a work place injury and such employees were regarded as disabled. This policy caused a hostile work environment in which Hispanics, who worked the most dangerous jobs, were driven like animals and fired if they asked for even the slightest accommodation for an injury or an illness. When it was known that an employee was experiencing problems, instead of accommodating him/her, E.A. Miller purposefully increased the workload. Gorostieta presented additional evidence that E.A. Miller purposely failed to train him.

The Court of Appeals, however, held that E.A. Miller did not discriminate against Gorostieta for being disabled when they rehired him and then learned that he needed surgery as a result of a work-related injury. In reaching that conclusion, the Court of Appeals stated that Gorostieta had, "failed to present any evidence of the expected duration of her impairment as of the date of [his] termination." App. A at 6a (citing *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996). In so ruling, the Court of Appeals established a standard which places the burden of providing reasonable accommodations on the employee, instead of on the employer as intended by the ADA.

The Court of Appeals further asserted that Gorostieta should have immediately provided admissible evidence that he could have returned to his job with or without a reasonable accommodation. Such logic is flawed for several reasons. First, it assumes there was an open dialogue where none existed. In *Hudson*, it appears that the plaintiff was asked when she would return and she stated she did not know. Here, no dialogue occurred or was possible. Gorostieta and Rivera presented overwhelming evidence of

E.A. Miller's policy to terminate any employee who had hand surgery for carpel tunnel or other surgeries regardless of the time for surgery and the recovery period. E.A. Miller had a known policy that they would force disabled employees to quit by putting more pressure on them to perform with the design to make them fail or quit. Gorostieta was a prime example of this since he was told that if he even complained about his hands hurting he would be fired.

Second, the ADA places the burden on the employer to, "make preemployment inquiries into the ability of an applicant to perform job-related functions . . . and may require a medical examination after an offer of employment has been made and prior to the commencement of employment duties of such applicant."[7] This indicates that once an employee informs the employer the he/she needs surgery, the employer should inquire how long the employee will need to recover. Failure to do so would be a wrongful termination under the ADA. Nevertheless, the standard set forth by the Court of Appeals reaches the opposite result — instead of requiring the employer to make reasonable accommodations for the disability, the employer is free to terminate the employee as long as he/she fails to mention how long the disability is expected to last. Such a result violates the intent of the ADA and public policy.

Third, E.A. Miller had a explicit, written policy that employees injured on the job who needed surgery would be returned to their positions after their recovery. If this were truly E.A. Miller's policy it would have been incumbent upon E.A. Miller to communicate with him in an attempt to reach an accommodation. Perhaps this was

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7. 42 U.S.C. § 12112(d).

not initially necessary under the ADA, but once E.A. Miller instituted the policy it should not have been allowed to enforce it in a discriminatory manner. The decision of the Court of Appeals, though, applies a standard which protects an employer, like E.A. Miller, who purposefully violates its own written policies simply because the disabled employee did not affirmatively inform the employer of the length of the recovery period.

In dismissing Rivera's claim for disability discrimination, the Court of Appeals also chose to assume the correctness of the Respondents' version of the events. E.A. Miller claimed that Mr. Rivera was discharged because of a safety violation. Rivera asserted he was discharged on two grounds: he was Hispanic and he was injured. With respect to Rivera's claim of disability discrimination, however, the Court of Appeals reasoned that since the employer waited nine months prior to terminating him, Rivera cannot show pretext.

Contrary to the reasoning of the Court of Appeals, Rivera can show pretext by either directly showing there is a genuine issue of material fact that a discriminatory reason more likely motivated the employer or by indirectly showing that the employer's proffered explanation is unworthy of credence. In this case, Rivera presented evidence that safety rules were enforced in a discriminatory manner against minorities and injured workers, that he did not commit a safety violation, that in fact he was encouraged to violate safety rules under certain situations, and finally that once an employee had been injured, he was targeted for termination. Assuming the truth of all of these facts, the Court of Appeals should have reversed summary judgment since E.A. Miller limited, segregated, and classified him in

a way which deprived and tended to deprive him of employment opportunities and otherwise adversely affect his status as an employee, because of his race and perceived disability.

More importantly, the decision of the Court of Appeals indicates its willingness to uphold disability discrimination by shifting the burden of providing reasonable accommodations from the employer to the disabled employee. Consequently, in the Tenth Circuit, employers will be free to decline reasonable accommodations in cases where the employee fails to inform the employer of the expected duration of the injury, even when the employer never inquires about the duration. Such a result is contrary to the anti-discrimination provisions and intent of the ADA. Therefore, this Court should grant the Petition to clarify the responsibilities of employers and employees in arranging for reasonable accommodations for disabilities.

CONCLUSION

Accordingly, the Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED FEBRUARY 25, 1999

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

(D.C. No. 94-NC-148B)
(D. Utah)

PATRICIA JOHNSON, MOSESE FIEFIA, OFA FIEFIA, JAIME GOROSTIETA, ESTEBAN RIVERA, LORENZO RODRIGUEZ, ANTONIO RUEDA, VICTOR JAMES SHEPARD, as the heir and personal representative of Ruby Shepard, LOLOHEA TUPOU, TAUFA TUPOU,

Plaintiffs – Appellants,

vs.

E.A. MILLER, INC., RICK BLACK, TED MILLER,

Defendants – Appellees.

ORDER AND JUDGMENT*

Before **PORFILIO**, **KELLY**, and **LUCERO**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

Submitted on the briefs:**

Plaintiffs-appellants filed numerous claims, under both state and federal law, related to their former employment with Defendant-appellee E.A. Miller, Inc. The district court dismissed each claim with prejudice except for Plaintiff Patricia Johnson's claim for breach of contract, which was dismissed without prejudice. Our jurisdiction over this appeal arises under 28 U.S.C. § 1291, and we affirm.

Because the parties are familiar with the underlying facts, we will not restate them unless necessary for the issue on review. Plaintiffs raise seventeen issues, many of which overlap.

A.

Ms. Johnson asserts that the district court erred in granting summary judgment on her claims of sexual harassment, sex, age, and religious discrimination, and retaliation. We review a grant of summary judgment de novo, applying the same legal standard as used by the district court. *See Meyer v. Conlon*, 162 F.3d 1264, 1267 (10th Cir. 1998).

Under 42 U.S.C. § 2000e-5(e)(1), a charge alleging an unlawful employment practice must be filed within 300 days

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** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1 (G). The cause therefore is ordered submitted without oral argument.

of the last alleged discriminatory act. Ms. Johnson filed her charge of sexual harassment on May 24, 1993. Thus, the district court cannot hear her claims of sexual harassment unless she is able to allege at least one instance of such harassment on or after July 21, 1992. This she has failed to do. Although she alleges that other forms of discrimination occurred after that date, we are unable to find any allegation of *sexual* harassment, and as we stated in *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1415 (10th Cir. 1993), "[i]t is not sufficient merely that acts [involving sexual harassment] outside the required time limit had a continuing *effect* within the statutory time allowed for suit." As such, there was no error in granting summary judgment on this claim.

We turn to Ms. Johnson's sex discrimination claim. Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Ms. Johnson's claim fails because she has not made a sufficient showing that the treatment she received by the defendants was *because of* her sex. Rather, it seems clear that the conflicts she experienced were the result of a serious difference in opinion over how health services were to be provided at E.A. Miller, Inc. The fact that Ms. Johnson both is female and disagrees with the wisdom of the company's business decisions does not state a claim for sex discrimination. *See Brandt v. Shop 'N Save Warehouse Foods, Inc.*, 108 F.3d 935, 938 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 850 (1998).

Ms. Johnson also asserts that the district court erred in dismissing her age and religious discrimination claims for failure to exhaust administrative remedies. However, contrary to her assertion, in the Tenth Circuit exhaustion is a jurisdictional prerequisite to bringing a Title VII action in federal court. *See Jones v. Runyon*, 91 F.3d 1398, 1399 n.1 (10th Cir. 1996); *Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). Thus we affirm the dismissal of these claims for substantially the reasons given by the district court. *See* District Court Order of August 23, 1995.

Ms. Johnson next asserts that the district court erred in granting summary judgment on her retaliation claim. To establish a prima facie case of retaliation, she must show "(1) protected opposition to discrimination . . . ; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action." *Jeffries v. Kansas*, 147 F.3d 1220, 1231 (10th Cir. 1998) (quoting *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993)). She identifies the protected activity as complaining to the company's personnel director about sexual harassment and the adverse employment action as a meeting with management in which she was allegedly reprimanded for her inability to work with her supervisor, Defendant Rick Black. Her claim fails in part because she is not able to demonstrate a causal connection between the protected activity and the adverse employment action: the meeting with management occurred several months after her complaint about the sexual harassment. Her claim also fails because, notwithstanding this circuit's liberal definition of "adverse employment action," *see Jeffries*, 147 F.3d at 1231-32, the meeting itself does not constitute such action. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2268

(1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."); *Burnett v. Western Resources, Inc.*, 929 F. Supp. 1349, 1362 (D. Kan. 1996) ("One isolated instance of an unwarranted reprimand does not rise to the level of a cognizable retaliation claim.").

B.

Plaintiffs Jaime Gorostieta and Esteban Rivera contend that the district court erred in granting summary judgment on their claims of national origin and disability discrimination.

The district court properly granted summary judgment on their national origin claims because, in their depositions, both Mr. Gorostieta and Mr. Rivera disclaimed any adverse employment action as a result of their national origin. Both expressly claimed that they were discriminated against only because of their work-related injuries. "[I]f a civil rights plaintiff concedes . . . that the sole reason for the discharge was a motive prohibited by a law entirely different from the one under summary judgment scrutiny, such a concession mandates grant of summary judgment as to the latter claim." *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 328 (10th Cir. 1996).

We turn to the disability discrimination claims of Messrs. Gorostieta and Rivera. To state a claim under the ADA, "a plaintiff must demonstrate: (1) that she is a disabled person within the meaning of the ADA, (2) that she is qualified, that is, she is able to perform the essential functions of the

job, with or without reasonable accommodation, and (3) that the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability." *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (citations omitted). If a plaintiff fails to prove any element of his prima facie case, summary judgment is proper.

Messrs. Gorostieta and Rivera argue that they qualify as "disabled" persons because they were "regarded as" such under the ADA. *See* 42 U.S.C. § 12102(2)(C). However, we need not determine whether they meet the statutory definition of "disabled," because both are nonetheless unable to satisfy the other elements of a prima facie case of discrimination. Mr. Gorostieta has failed to show that he is "qualified" under the ADA. He was initially terminated for poor performance, after receiving numerous warnings both before and after the onset of pain in his hands over a two-and-one-half year period. However, after his brother-in-law interceded for him, the company agreed to reinstate him. When he reported to work, he presented a note from his doctor indicating that he needed surgery and, as a result, was told by both his supervisor and the personnel director that he could not have the job.

Mr. Gorostieta cites our decision in *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996) for the proposition that "a reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation." *Id.* at 1169. However, he fails to note that in *Hudson* we upheld summary judgment against the plaintiff because she had "failed to present any evidence of the expected duration of

her impairment as of the date of her termination." *Id.* We went on to state that an employer is "not required to wait indefinitely for [the employee's] recovery." *Id.*; *see also Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("[R]easonable accommodation is . . . that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.").

Although Mr. Gorostieta stated in his deposition that his doctor told him that his recovery would take one to two months, he did not communicate this information to the company, and the evidence is otherwise inadmissible as hearsay. "It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment." *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995).

Mr. Rivera is unable to establish the third element of an ADA claim — that is, an inference that the employer terminated his employment based on his disability. The employer claims that Mr. Rivera was discharged because he had committed a serious safety violation. The injury to his thumb which allegedly led the employer to regard him as disabled occurred nine months prior to the termination of his employment. Although his supervisors knew of his injury, he requested no accommodation and indeed was rated as "outstanding" in the quality and quantity of his work. Although Mr. Rivera denies committing a safety violation, he concedes (and there is ample evidence) that the employer believed that he had broken the rules. Thus, even if Mr. Rivera were to establish a prima facie case, he is not able to show that the employer's proffered reason for firing him was a pretext for discrimination based on his

"disability." *See McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992) (Pretext "addresses the issue of whether the employer honestly believes in the reasons it offers.").

C.

All of the plaintiffs brought claims of intentional infliction of emotional distress against the defendants. Seven of the plaintiffs brought additional tort claims. The district court dismissed each of these claims under Fed. R. Civ. P. 12(b)(6), holding that Utah's Workers' Compensation law provides the exclusive remedy for the plaintiffs' injuries. We review de novo. *See Ordinance 59 Assoc. v. United States Dep't of the Interior Secretary*, 163 F.3d 1150, 1152 (10th Cir. 1998). Having read the briefs and the record, we agree with the district court that the plaintiffs have failed to show either that the injuries arose outside of the context of employment or that the employer actually and deliberately intended to injure them. It is not enough to show "[i]ntentional actions, coupled with knowledge that the injurious result was substantially certain to occur." *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 786 (10th Cir. 1995) (citing *Lantz v. National Semiconductor Corp.*, 775 P.2d 937, 939-40 (Utah Ct. App. 1989)).

D.

Five of the plaintiffs brought common law wrongful discharge claims. The district court dismissed these claims, finding that they were either preempted by Utah's Occupational Safety and Health Act ("UOSHA"), Utah Code Ann. § 34A-6-203 (1997), or failed to state a claim. We agree.

Appendix A

An at-will employee can state a claim for wrongful termination, if, inter alia, "the termination of employment constitutes a violation of a clear and substantial public policy." *Fox v. MCI Communications Corp.*, 931 P.2d 857, 859 (Utah 1997). This is a limited remedy. *See id.* at 861 ("[I]f an employee reports a criminal violation to an employer, rather than to public authorities, and is fired for making such reports, that does not, in our view, contravene a clear and substantial public policy" because the disclosure "serves the private interest of the employer, not the public interest."); *see also Peterson v. Browning*, 832 P.2d 1280, 1282 (Utah 1992). In addition, any "public policy" actions which are based on a statutory cause of action are preempted. *See Retherford v. AT&T Communications*, 844 P.2d 949, 962-66 (Utah 1992).

Thus, to the extent that plaintiffs' wrongful termination claims are based upon UOSHA or the Utah Anti-Discrimination Act, Utah Code Ann. § 34A-5-107(15) (1997), they are preempted by those statutes. To the extent that the claims are based upon retaliation for internal company complaints (not communicated to public authorities), they do not implicate a clear and substantial public policy. To the extent that the claims are based upon retaliation for use of medical benefits, they are preempted by Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990) ("Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510."). We note that plaintiffs did not allege federal claims under ERISA, and thus the state law claims were properly dismissed.

Appendix A

Plaintiff Ofa Fiefia argues that she was wrongfully terminated based upon the false criminal accusation that she started a fight. The case Ms. Fiefia relies upon, *Hodges v. Gibson Prod. Co.*, 811 P.2d 151 (Utah 1991), is distinguishable in that, unlike the plaintiff in *Hodges*, Ms. Fiefia's alleged conduct was not reported to public authorities. In view of Utah's narrow construction of public policies upon which a wrongful termination claim may be based, *see Peterson*, 832 P.2d at 1282, we cannot see a clear and substantial public policy violated by the company's alleged false accusation against Ms. Fiefia in order to justify firing her.

E.

Plaintiffs argue that the district court erred in dismissing claims against defendants Rick Black and Ted Miller and in dismissing their class action. We affirm both for substantially the reasons provided by the district court. *See* District Court Order of August 23, 1995. In addition, we note that any error would be mooted by our disposition of the substantive issues above.

F.

Plaintiff Antonio Rueda argues that the district court erred in denying his motion to intervene. We review a denial of permissive intervention for abuse of discretion. *See City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996). We find no such abuse here, as the settlement agreement relied upon by Mr. Rueda does not give him the right to sue on behalf of third parties, and Mr.

Rueda does not assert any injury personally from the alleged breach of the agreement.

G.

Plaintiff Patricia Johnson contends that the district court erred in dismissing her state law breach of contract claim. However, since supplemental jurisdiction is a doctrine of discretion, *see United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), a district court may decline to exercise jurisdiction over a state law claim. *See Thatcher Enter. v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990). Because all of Ms. Johnson's other claims were dismissed, the district court acted within its discretion in dismissing her remaining state law claim without prejudice.

Finally, Ms. Johnson argues that the magistrate judge abused his discretion in granting a protective order for a confidential document that was inadvertently delivered by the defendants to the plaintiff during discovery. We review for abuse of discretion, *see Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 853 (10th Cir. 1996), and affirm for substantially the reasons given by the magistrate judge in his order. *See* District Court Order of December 31, 1996.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, NORTHERN DIVISION DATED AUGUST 23, 1995 AND FILED AUGUST 25, 1995

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – NORTHERN DIVISION

Civil No. 94-NC-148B

PATRICIA JOHNSON, et al.,

Plaintiffs,

vs.

E. A. MILLER, et al.,

Defendants.

ORDER

On August 21, 1995, a hearing was held before the Honorable Dee Benson on the Defendants' motion to dismiss and for summary judgment. Loren M. Lambert represented the plaintiffs. Janet Hugie Smith, Scott A. Hagen and Robert O. Rice represented the Defendants. Having reviewed the second amended complaint, having read the memoranda submitted by the parties, having heard oral argument from counsel, being fully apprised, and for good cause appearing, the court makes the following findings and enters the following Order.

Appendix B

BACKGROUND

The Plaintiffs include employees, former employees, and an heir of a former employee of defendant E.A. Miller, Inc. The Defendants are E.A. Miller, Inc., a slaughterhouse and packing plant in Cache Valley, and two of its employees: Ted A. Miller, President, and Rick Black, Health and Safety Manager during the time that at least some of the alleged causes of action accrued. Plaintiffs' Second Amended Complaint alleges twenty-eight claims including wrongful termination; sexual, age, disability, racial and religious discrimination; retaliation; breach of employment contract; gross negligence; negligent employment and supervision of a violent employee; failure to pay benefits; wrongful death; intentional infliction of emotional distress; and fraud and misrepresentation. Plaintiffs also seek class certification and injunctive relief. Defendants seek to dismiss all claims brought against the individual Defendants and all but three of the causes of action brought against Defendant E.A. Miller, Inc.

I. CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

Of Plaintiffs' twenty-eight claims, only seven are asserted against the individual Defendants: 1, 3-5, 22-25. These seven claims are dismissed as to the individual Defendants for the following reasons: Claim 1 (wrongful termination) is dismissed as to the individual Defendants because Plaintiffs have failed to allege any facts showing that the individual Defendants acted outside the scope of their employment in committing the alleged wrongful acts

or that the Defendants acted maliciously, criminally, or out of personal motives. Claims 3-5 (discrimination) are dismissed as to the individual Defendants because there is no individual liability under Title VII; Title VII allows suits against employers, not against wrongdoing employees. Claim 22 (intentional infliction of emotional distress) is dismissed as to the individual Defendants because it is precluded by Utah's Workers' Compensation law. Claim 23 (fraud) is dismissed as to the individual defendants because Plaintiffs have failed to identify misrepresentations by the individual Defendants to the Plaintiffs. Claim 24 (request for class action) and claim 25 (request for injunctive relief) are dismissed as to the individual defendants because the Plaintiffs have failed to support any cause of action against the individual Defendants and for the reasons discussed in II. F. and II. G. below.

II. CLAIMS AGAINST E.A. MILLER

A. Wrongful Termination Claims: 1, 6, 13, 15, 18, 28

The claims alleging wrongful termination in violation of public policy are either preempted or fail to state a claim. To succeed upon a claim of "discharge in violation of [a certain] public policy," Plaintiffs must first show that they were "discharged . . . in a manner or for a reason that contravened 'a clear and substantial public policy' of the State of Utah, a public policy rooted in Utah's constitution or statutes" or judicial decisions. *Hodges v. Gibson Products Co.*, 811 P.2d 151, 166 (Utah 1991). To determine whether a *statute* "embodies a clear and substantial public policy," the Court should consider two factors: "First, . . . whether

[the] statute is one of overarching importance to the public, as opposed to the parties only. Second, . . . whether the public interest is so strong and the policy so clear and weighty that we should place the policy beyond the reach of contract, thereby constituting a bar to discharge that the parties cannot modify, even when freely willing and of equal bargaining power." *Retherford v. AT & T*, 844 P.2d 949, 966 n.9 (Utah 1992).

Claim 1 is preempted by the Utah Occupational Safety and Health Act. Claim 6 is preempted in part by UOSHA and ERISA, and it is insufficient as a matter of law. Claim 13 fails to identify a clear and substantial public policy embodied in Utah statutes, constitution, or judicial decisions. Claim 15 is preempted in part by UOSHA and insufficient in part because it fails to identify a clear and substantial public policy. Claims 18 and 28 are preempted by UOSHA and ERISA, and they also fail to identify a clear and substantial policy.

B. Title VII Claims: 2-5, 26, 27

Defendants do not seek to dismiss claims 2 (breach of contract) or 4 (hostile workplace sexual harassment) as asserted against E.A. Miller. Nor do Defendants seek to dismiss claim 3 (age, religious, and sexual discrimination) insofar as it alleges sexual discrimination by E.A. Miller. Defendants seek dismissal of claim 3's assertion of age and religious discrimination, of claim 5 (retaliation), of claim 26 (racial discrimination), and of claim 27 (disability discrimination).

Although claim 3 alleges sexual, age and religious discrimination, Ms. Johnson has exhausted her administrative remedies only as to the claim for sexual discrimination. The Tenth Circuit, federal courts lack subject matter jurisdiction over Title VII claims where a plaintiff has failed to exhaust administrative remedies. *Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). Filing an EEOC complaint is a critical step towards exhaustion of administrative remedies on Title VII claims. Ms. Johnson's EEOC complaint asserted only sexual discrimination; it did contain charges of age or religious discrimination. Age and religious discrimination do not, as a matter of law, reasonably relate to or grow out of Ms. Johnson's sexual discrimination claim. Claims 26 and 27 fail for the same reasons.

The Defendants' motion is denied as to Claim 5 (retaliation). Giving Ms. Johnson's EEOC sexual discrimination submission its most liberal and generous (to Ms. Johnson) reading possible, the submission could be read to include the alleged retaliation.

C. Claims Precluded by Worker's Compensation: 7-8, 10-12, 14, 17, 19, 20, and 22

Claims 7-8, 10-12, 14, 17, 19, 20, and 22 allege that Plaintiffs suffered physical or emotional injuries due to the Defendants' gross negligence, negligent employment or supervision, causation of wrongful death, and intentional infliction of emotional distress. Utah's Workers' Compensation law provides the exclusive remedy for these injuries. Plaintiffs' injuries arose while Plaintiffs were in

the service of E.A. Miller and Plaintiffs have failed to show the "deliberate intent to injure" that would allow the Plaintiffs to bring common-law claims against their employer. *Lantz v. National Semiconductor Corp.*, 775 P.2d 937, 939-40 (Utah Ct. App. 1989).

D. Fraud and Misrepresentation Claim: 23

Plaintiffs have failed to plead fraud with the particularity required by Fed. Rule Civ. Pro. 9(b). Moreover, Plaintiffs' allegations of fraud fail to satisfy the elements of that cause of action, namely, "a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon, upon which plaintiff reasonably relies to his [or her] detriment." *Sugarhouse Finance Co. v. Anderson*, 610 P.2d 1369, 1373 (Utah 1980). The only specific misrepresentation that the Plaintiffs have alleged is that Defendants falsely told Mr. Gorostieta that he could not seek coverage for his carpal tunnel surgery; this claim is preempted by ERISA. For these reasons, Plaintiffs' fraud and misrepresentation claim are dismissed with prejudice.

E. Health and Death Benefit Claims: 9, 16, and 21

Claims 9, 16, and 21 allege that E.A. Miller failed to pay health and death benefits that it was contractually obligated to pay. If these claims are based on state law — as they appear in the complaint to be — they are preempted by ERISA. However, Plaintiffs argue that the claims are ERISA claims. Plaintiffs do not allege that administrative remedies have been exhausted in relation to these claims.

Claims 9, 16, and 21 are dismissed without prejudice so that Plaintiffs can pursue proper ERISA channels or state clear ERISA claims.

F. Class Action: Claim 24

Plaintiffs have failed to provide any evidence that the requirements of class certification are met — *e.g.*, a list of members of the class or the characteristics of members of the class. Instead, they have relied on allegations that each prerequisite of a class action has been satisfied. Such allegations are insufficient to satisfy the requirements of the federal class action rule, Fed. Rule Civ. P. 23. Furthermore, with Ms. Johnson as the only remaining Plaintiff, it appears that no possible class claims could be brought; her claims are different than, not representative of, the claims that were asserted by the other Plaintiffs.

G. Injunction: Claim 25

Plaintiffs have failed to make sufficient allegations to support an injunction. The Tenth Circuit has established that, in order to prevail on a motion for preliminary injunction, the movant must show that: "(1) the movant will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; (3) that the injunction, if issued, would not be adverse to the public interest; and (4) substantial likelihood that the movant will succeed on the merits." *Walmer v. United States Department of Defense*, 52 F.3d 851, 854 (10th Cir. 1995). Plaintiffs have failed to make sufficient allegations to

support a preliminary injunction under this test. The motion for preliminary injunction is denied without prejudice.

CONCLUSION

Plaintiffs have largely failed to pursue appropriate channels of relief or to provide a basis on which this Court could grant relief. Defendants' motion to dismiss and for summary judgment [file #9] is GRANTED as to all claims except claims as to claim 5. The only remaining claims are those of Ms. Johnson against E.A. Miller alleging breach of employment contract (claim 2), sexual discrimination (claims 3 and 4), and retaliation (claim 5).

Dated this 23rd day of August, 1995.

s/ Dee V. Benson
Dee V. Benson
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED DECEMBER 11, 1997

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 94-NC-148B

Judge Dee V. Benson

PATRICIA JOHNSON, JAIME GOROSTIETA, ESTEBAN EPIFANIO RIVERA, and GEORGE FREGOSO,

Plaintiffs,

v.

E. A. MILLER INC.,

Defendant.

ORDER

Appendix C

Defendant's motion for summary judgment came on for hearing before the Honorable Dee V. Benson, United States District Judge, at 3:30 p.m. on October 3, 1997. Janet Hugie Smith, Esq. and Scott A. Hagen, Esq. appeared and made argument on behalf of defendant, E. A. Miller, Inc. Loren M. Lambert, Esq. appeared and made argument on behalf of the plaintiffs, Patricia Johnson, Jaime Gorostieta and Esteban E. Rivera.

Prior to the hearing, the court reviewed the legal memoranda, exhibits and affidavits submitted by counsel in support of, and in opposition to, the motions for summary judgment. Having reviewed those documents and heard oral argument of counsel, the Court now deems itself duly advised of the material facts and applicable legal authority. The Court determines that plaintiffs have not presented sufficient evidence to raise a genuine issue of material fact as to any of the Title VII claims or claims brought under the Americans with Disabilities Act. Accordingly, the Court hereby makes the following ORDER:

1. Defendant's motion for summary judgment as to claims of Patricia Johnson is granting for the reasons stated in defendant's legal memoranda in support of the motion, except that the motion is denied as to Patricia Johnson's claim for breach of contract;

2. Defendant's motion for summary judgment as to claims of Jaime Gorostieta is granted for the reasons stated in defendant's legal memoranda in support of the motion;

Appendix C

3. Defendant's motion for summary judgment as to claims of Esteban Rivera is granted for the reasons stated in defendant's legal memoranda in support of the motion.

The court finds that the sole remaining claim in this case, Patricia Johnson's claim of breach of contract, has no independent basis for federal jurisdiction. In the exercise of its discretion, the Court declines to exercise supplemental jurisdiction over that claim. Accordingly, it is dismissed without prejudice.

Based on the foregoing, the Third Amended Complaint is dismissed with prejudice, except for Johnson's claim of breach of contract, which is dismissed without prejudice.

DATED this 11th day of December, 1997.

BY THE COURT:

s/ Dee V. Benson
Hon. Dee V. Benson
U.S. District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-4200

PATRICIA JOHNSON; ANTONIO RUEDA; LOLOHEA TOPOU; TAUFA TUPOU; OFA FIEFIA; MOSESE FIEFA; LORENZO RODRIGUEZ; JAIME GOROSTIETA; VICTOR JAMES SHEPARD, as the heir and personal representative of Ruby Shepard; ESTEBAN EPIFANIO RIVERA,

Plaintiffs – Appellants,

v.

E.A. MILLER, INC., RICK BLACK, TED MILLER,

Defendants – Appellees.

ORDER

Filed April 19, 1999

Before **PORFILIO**, **KELLY** and **LUCERO**, Circuit Judges.

Appellants' petition for rehearing is denied.

Appendix D

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: s/ [illegible]
Deputy Clerk